STATE OF MICHIGAN

COURT OF APPEALS

PATRICIA NELSKI, a.k.a., PATRICIA PELLAND

Plaintiff-Appellant,

v

AMERITECH, AMERITECH SERVICES, INC., AMERITECH COMMUNICATIONS, INC., AMERITECH CORP., INC., AMERITECH PUBLISHING, INC., and MICHIGAN BELL TELEPHONE CO.,

Defendants-Appellees.

UNPUBLISHED
May 10, 2007

No. 273728
Wayne Circuit Court
LC No. 01-121059-NO

Before: Talbot, P.J., and Donofrio and Servitto, JJ.

PER CURIAM.

Plaintiff appeals as of right a trial court order granting summary disposition in defendants' favor. Because the trial court properly ruled that plaintiff's defamation claim is barred by the applicable statute of limitations and no tolling or waiver of the limitations period occurred, we affirm.

Plaintiff filed the instant action on June 22, 2001 based upon based upon her allegations that defendants published false information regarding an account with them to credit reporting agencies, which then appeared on her credit report.[1] In her complaint, plaintiff alleged that she was a customer of defendants and, in 1996, discovered that someone had opened a fraudulent

[1] Plaintiff previously filed suit against defendants in January of 2001 based on the same facts. The matter was removed to the US District Court (plaintiff's complaint including a violation of the Fair Credit Reporting Act, 15 USC 1681 *et seq*. claim), where, in May, 2001, plaintiff's federal claims were dismissed on the merits. The District Court declined to exercise supplemental jurisdiction over plaintiff's state law claim and dismissed that claim as well.

account with defendants in her name.[2] According to plaintiff, she advised defendants that the account with them was fraudulent and was informed that the problem would be rectified. Plaintiff further alleged that in 1999 she became aware that defendants were still reporting the fraudulent account as an unpaid account in her name, and again contacted defendants (as well as credit reporting agencies) to request removal of the false account from her credit report. Defendants assured plaintiff the false financial information would be removed within 90 days. Plaintiff alleged that despite these assurances, she discovered in February 2000 that her credit report still contained the false information of an unpaid account due to defendants. Plaintiff's complaint against defendants set forth claims of defamation and violation of the Fair Credit Reporting Act, 15 USC 1681, *et seq* (FCRA).

Defendants removed the matter to the US District Court asserting that because plaintiff alleged a violation of the FCRA, the federal court had original federal question jurisdiction. Defendants then moved for dismissal of the complaint in the US District Court. The District Court dismissed plaintiff's FRCA claims with prejudice, and declined to exercise supplemental jurisdiction over her state law claim, remanding the state law claim to the circuit court for resolution.

Defendants thereafter moved for summary disposition in the circuit court pursuant to MCR 2.116(C)(8), asserting that plaintiff's state law defamation claim was preempted by the FCRA. The circuit court agreed and dismissed plaintiff's complaint. A panel of this Court granted leave to appeal that decision and, in *Nelski v Ameritech*, unpublished opinion per curiam of the Court of Appeals, issued June 29, 2004 (Docket No. 244644), held that the trial court erred in dismissing plaintiff's state common-law claim on the basis of preemption and remanded the matter to the trial court.

Our Supreme Court denied defendants' subsequent application for leave to appeal (*Nelski v Ameritech, Ameritech Services, Inc*, 474 Mich 884; 704 NW2d 700 (2005)) and the matter proceeded in the circuit court. Defendants then filed a motion for summary disposition in the circuit court pursuant to MCR 2.116(C)(7), contending that plaintiff's defamation claim was barred by the one-year statute of limitations applicable to her claim. The trial court initially denied defendants' motion, but, on defendants' motion for reconsideration, granted summary disposition in defendants' favor in a June, 2006 order.

Plaintiff filed a motion to set aside the order, as the order contained language precluding her from amending her complaint when she had not filed a motion requesting amendment. At that time, plaintiff also filed a motion to amend her complaint to add claims of breach of contract and promissory estoppel. On September 29, 2006, the trial court entered an order granting plaintiff's motion to set aside the court's June 23, 2006 order and entered a new order simply granting defendants' motion for reconsideration and entering summary disposition in favor of defendants, with no mention of amending plaintiff's complaint. Plaintiff now appeals as of right

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[2] Plaintiff alleged that around the same time, she discovered she had been a victim of identity theft and that there were tens of thousands of dollars incurred on other accounts fraudulently opened in her name.

the September 29, 2006 order granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(7).

We review de novo a trial court's decision on a motion for summary disposition under subrule (C)(7) to determine whether the moving party was entitled to judgment as a matter of law. *Stoudemire v Stoudemire*, 248 Mich App 325, 332; 639 NW2d 274 (2001). We similarly review de novo the legal question concerning whether the applicable statute of limitations bars a cause of action. *Ins Comm'r v Aageson Thibo Agency*, 226 Mich App 336, 340-341; 573 NW2d 637 (1997).

MCR 2.116(C)(7) permits summary disposition where the claim is barred because of any one of several occurrences, including where the applicable statute of limitations has run. In reviewing a motion under MCR 2.116(C)(7), the Court accepts as true the plaintiff's well-pleaded allegations, construing them in the plaintiff's favor. *Hanley v Mazda Motor Corp*, 239 Mich App 596, 600; 609 NW2d 203 (2000). The Court must consider affidavits, pleadings, depositions, admissions, and documentary evidence submitted by the parties to determine whether a genuine issue of material fact exists. *Id.* Where a material factual dispute exists, such as to matters regarding whether a plaintiff discovered or should have discovered a possible cause of action relative to accrual of a limitations period, summary disposition is not appropriate. *Mascarenas v Union Carbide Corp*, 196 Mich App 240, 245; 492 NW2d 512 (1992); *Kent v Alpine Valley Ski Area, Inc*, 240 Mich App 731, 736; 613 NW2d 383 (2000). Where no material facts are in dispute, whether the claim is barred is a question of law. *Id.*

As an initial matter, we note that defendants challenge the jurisdiction of this Court over plaintiff's appeal. According to defendants, the trial court granted their motion for summary disposition in a June 23, 2006 order and plaintiff did not file her claim of appeal until October 12, 2006--well outside the 21-day time limit for filing an appeal as of right. See MCR 7.204(A). However, after entry of the June 23, 2006 order, plaintiff moved to set aside the same. The trial court granted plaintiff's motion, set aside the order, and entered a new, altered order of dismissal on September 29, 2006. Plaintiff having filed her claim of appeal within 21 days of the September 29, 2006 order, her claim is timely and this Court has jurisdiction over the appeal. Having jurisdiction, we move on to the specific issues plaintiff raises on appeal.

The only state law cause of action pleaded in plaintiff's complaint is defamation. The limitations period for defamation is one year. MCL 600.5805(9). On appeal, plaintiff does not dispute that her claim is subject to the one-year statute of limitations set forth in MCL 600.5805(9), but instead argues that defendants waived any defense based on the statute of limitations by failing to raise this defense in their first responsive pleading. We disagree.

MCR 2.111(F)(2) provides, in relevant part:

> (2) *Defenses must be pleaded; Exceptions*. A party against whom a cause of action has been asserted by complaint, cross-claim, counterclaim, or third-party claim must assert in a responsive pleading the defenses the party has against the claim. A defense not asserted in the responsive pleading or by motion as provided by these rules is waived, except for the defenses of lack of jurisdiction over the subject matter of the action, and failure to state a claim on which relief can be granted. However

> (a) a party who has asserted a defense by motion filed pursuant to MCR 2.116 before filing a responsive pleading need not again assert that defense in a responsive pleading later filed . . .

MCR 2.116(D)(2) additionally provides that the grounds for summary disposition listed in MCR 2.116(C)(5), (6), and (7) "must be raised in a party's responsive pleading, unless the grounds are stated in a motion filed under this rule prior to the party's first responsive pleading."

As indicated by defendants, a "pleading" includes only complaints, cross-claims, counterclaims, third-party complaints, answers to the same, or replies to answers. MCR 2.110. Indeed, MCR 2.111(F)(2) differentiates between a motion and a responsive pleading by using the language "in a responsive pleading *or* by motion " (emphasis added).

In the instant matter, defendants at no time filed an answer to plaintiff's complaint or another document that would fall within the definition of a "pleading." Instead, defendants removed the matter to federal court and, after the matter was remanded to the trial court, filed a motion for summary disposition pursuant to MCR 2.116(C)(8), then filed a motion for summary disposition pursuant to MCR 2.116(C)(7) (which the trial court ultimately granted). Because defendants asserted a statute of limitations defense in *a* motion prior to their first responsive pleading, they did not waive the defense. See MCR 2.116(D)(2).

On this issue, plaintiff also contends that there is and was no factual support for a statute of limitations defense because defendants continued to publish the false information as of February, 2000 and beyond, and plaintiff's initial complaint filed in January, 2001 was therefore timely. We disagree.

A defamation claim accrues when "the wrong upon which the claim is based was done regardless of the time when damage results." MCL 600.5827. In her complaint, plaintiff stated that she became aware in late May of 1999 that false financial information regarding an account with defendants was being reported on her credit report. Plaintiff also alleged that in February of 2000 she became aware that her credit report was still marred by the false information. Importantly, there is no indication that the information on her credit report in 2000 was any different than that reported in 1999 or that defendants made a second publication of the information to the credit reporting agencies. In fact, in her complaint, plaintiff refers to her credit report in 2000 as being "still marred" rather than "again marred." Moreover, "[t]he statute does not contemplate extending the accrual of the claim on the basis of republication, regardless of whether the republication was intended by the speaker." *Mitan v Campbell*, 474 Mich 21, 25; 706 NW2d 420 (2005).

Plaintiff's claim thus accrued, at the latest, in May, 1999 when she became aware of the false information on her credit report and her complaint must have been filed by May of 2000. These facts were borne out in defendants' motion for summary disposition, providing a basis for dismissal under MCR 2.116(C)(7).

Next, plaintiff claims that the one-year limitations period was tolled by virtue of defendants' continuing wrongful acts. Whether the continuing wrong doctrine applies is a question of law that is reviewed de novo. *Garg v Macomb Co Mental Health Services*, 472 Mich 263, 272; 696 NW2d 646 (2005), amended 473 Mich 1205 (2005).

The continuing wrong doctrine is a creation of the federal courts to address the harsh effect of the statute of limitations in civil rights cases. *Garg, supra*, at 278-280. The doctrine allows for consideration of an otherwise untimely claim (*Blazer Foods, Inc v Restaurant Properties, Inc*, 259 Mich App 241, 246; 673 NW2d 805 (2003)) and is explained as "where a defendant's wrongful acts are of a continuing nature, the period of limitation will not run until the wrong is abated; therefore, a separate cause of action can accrue each day that defendant's tortious conduct continues." *Id.*, quoting *Jackson Co Hog Producers v Consumers Power Co*, 234 Mich App 72, 81; 592 NW2d 112 (1999). To recover under the continuing wrong doctrine, then, the plaintiff must establish that continual tortious acts constitute a continual wrong. *Id.* However, continual harmful effects from a completed act do not constitute a continuing wrong. *Id.*

Notably, the doctrine has only been applied in the limited cases of trespass, nuisance, and civil rights violations. *Id.* at 247. Most recently, in *Garg, supra*, our Supreme Court concluded, "that the 'continuing violations' doctrine is contrary to the language of §5805 and hold, therefore, that the doctrine has no continued place in the jurisprudence of this state," arguably holding that the doctrine is no longer applicable even to those limited classes of cases. *Id.* at 290.

Here, because plaintiff asserts a defamation claim, the doctrine would not be applicable. Moreover, even if the continuing wrongs doctrine could technically be applied to plaintiff's defamation claim, there would likely be no factual basis for its application in the present matter. As previously related, the statute of limitations "does not contemplate extending the accrual of the claim on the basis of republication . . ." *Mitan v Campbell, supra*, at 25. Thus, while plaintiff speculates that defendants resubmitted the false information to credit reporting agencies, such a republication would not result in a new accrual date. Moreover, because plaintiff appears to be only speculating that republication occurred, it is just as likely that plaintiff suffers from the continual harmful effects from the defendants' completed act in 1999, which, according to *Blazer Foods, Inc*, does not constitute a continuing wrong. Plaintiff's reliance on the continuing wrongs doctrine to toll the applicable statute of limitations is thus misplaced.

Plaintiff next claims that laches precludes defendant's assertion of a statute of limitations defense, as defendants first moved for summary disposition in 2002 and could (and should) have raised the defense at that time. We disagree.

Laches is generally viewed as an equitable affirmative defense that is primarily applicable where circumstances make it inequitable to grant relief to a plaintiff who unreasonably delays filing a claim. See, e.g., *Yankee Springs Twp v Fox*, 264 Mich App 604, 611; 692 NW2d 728 (2004); *In re Contempt of United Stationers Supply Co*, 239 Mich App 496, 504; 608 NW2d 105 (2000). "The doctrine [of laches] is concerned with unreasonable delay, and the defendant must prove a lack of due diligence on the part of the plaintiff resulted in some prejudice to the defendant." *Id.* at 504 (citations omitted).

Plaintiff cites to no Michigan law holding that the doctrine of laches may be utilized to preclude the use of an affirmative defense. A party may not merely announce his position and leave it to the court to discover and rationalize the basis for his claims, *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998), nor may he give issues cursory treatment with little or no citation of supporting authority. *Houghton v Keller*, 256 Mich App 336, 339; 662 NW2d 854 (2003). Plaintiff having provided no basis for application of the doctrine of laches in the manner

proposed (and this Court having been unable to uncover any), we need not consider this issue on appeal.

Plaintiff's final argument on appeal is that she should have been allowed to amend her complaint as requested in her June 30, 2006 motion. According to plaintiff, there is a sufficient basis for claims of promissory estoppel and breach of contract against defendants and such claims remain viable.

This Court reviews a denial of a motion for leave to amend a pleading for an abuse of discretion. *Franchino v Franchino*, 263 Mich App 172, 189; 687 NW2d 620 (2004). An abuse of discretion occurs when the trial court chooses an outcome falling outside the principled range of outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

Leave to amend a pleading "shall be freely given when justice so requires." MCR 2.118(A)(2). Motions to amend should be denied only for specific reasons such as "[1] undue delay, [2] bad faith or dilatory motive on the part of the movant, [3] repeated failure to cure deficiencies by amendments previously allowed, [4] undue prejudice to the opposing party by virtue of allowance of the amendment, [and 5] futility...." *Weymers v Khera*, 454 Mich 639, 658; 563 NW2d 647 (1997), quoting *Ben P Fyke & Sons v Gunter Co*, 390 Mich 649, 656; 213 NW2d 134 (1973).

Here, the trial court initially entered an order that granted summary disposition to defendants and ordered, "that Plaintiff is denied leave to file an Amended Complaint." Plaintiff moved to set aside the order, however, on the basis that she had not yet filed a motion to amend her complaint. At the same time, plaintiff did file a motion to amend her complaint. The trial court granted plaintiff's motion to set aside the order, and thereafter entered an order that simply granted summary disposition in defendants' favor. There is thus no order addressing plaintiff's motion to amend and no indication that the trial court considered or ruled on the same.

Generally, to preserve an issue for appellate review, it must be raised by a party and addressed by the trial court. *Brown v Loveman*, 260 Mich App 576, 599; 680 NW2d 432 (2004), lv den 470 Mich 881 (2004). Appellate review is generally limited to issues actually decided by the trial court. *Allen v Keating*, 205 Mich App 560, 564; 517 NW2d 830 (1994). This matter having not been actually decided by the trial court, there is no issue for this Court review.

Affirmed.

/s/ Michael J. Talbot
/s/ Pat M. Donofrio
/s/ Deborah A. Servitto